

OPEN RECORDS & MEETINGS TASK FORCE

September 22, 2015

- Meeting called to order: 8:32 AM
- Meeting adjourned: 10:31 AM

Members present: Attorney General Wayne Stenehjem, Jack McDonald, Tom Gerhardt, Aaron Birst, Fargo Interim Chief of Police Dave Todd, Rep. Bill Devlin, Terry Traynor, Charlie Whitman, Julie Leer, Lisa Feldner, Jerry Hjelmstad, Mary Kae Kelsch, Sandi DePountis, Tom Dennis, Matt Von Pinnon, Jon Godfread, Mike Ressler, Dave Maring.

Also present: Becky Lingle, ITD

After calling the meeting to order, Attorney General Wayne Stenehjem gave a brief overview of the open records and meetings laws, and the legislative history of the 1997 overhaul of state laws. Stenehjem was the prime sponsor of that legislation. Stenehjem explained that this is the third task force he has convened since taking office, and described how the previous two task forces operated.

Jack McDonald, attorney for the North Dakota Broadcasters Association and the North Dakota Newspaper Association gave a brief presentation of the history of the state's open records and meetings laws since 1957. McDonald explained that prior to 1997, then-Attorney General Heitkamp convened a task force to review the North Dakota Century Code and relevant court decisions and create a comprehensive legislative package of open records and meetings laws. For the first time, the 1997 legislation created the ability for members of the public to request an opinion from the Attorney General. McDonald explained that in proposing the 1997 legislation and opinion process, the task force took into consideration staffing and time requirements, which is why the law does not require the Attorney General to conduct a fact finding investigation but instead the opinion is based on the facts provided by the public entity. Stenehjem added that because there are criminal penalties still in state law, it may be difficult to conduct a fact finding investigation if it called for an official to make admissions that could be used in a later criminal proceeding.

In response to a question from Matt Von Pinnon, McDonald explained the legislative history for the exemptions for legislators. Stenehjem explained that the Attorney General cannot issue an opinion against legislators or the courts because it is a separation of powers issue. McDonald stated that although the courts are not subject to the open records and meetings laws, the Supreme Court has passed a number of rules that open court records.

Assistant Attorney General Sandy DePountis discussed the basics of the open records and meetings laws and outlined the opinion drafting process. She said some of the most common violations involve serial meetings – individual discussions that collectively involve a quorum – and email discussions, particularly the “reply all” feature, and unreasonable delays in providing records. DePountis pointed out that for every opinion that issues, another four or five

complaints have been resolved without the need for formal action. Stenehjem reminded the task force that Opinions set legal precedents, so the opinion drafting process is painstaking.

The committee had a general discussion about access to databases, costs of electronic records and adjusting for new technologies, and availability of records (record retention).

Becky Lingle from ITD explained that state agencies have record retention schedules which list general categories of that agency's records and the retention and method of disposal. Record retention policies for political subdivisions are established by those political subdivisions. DePountis reminded the task force that open records laws are separate from record retention requirements.

Stenehjem asked the task force for suggestions of issues they would like to be considered in detail at the next meeting. The following suggestions were received during the meeting:

- Personnel records, including protections for applications, hiring and firing records
- Review access to database information
- Charges for electronic records
- Commercial uses of database records obtained from public entity
- Additional exemptions for foundations of universities
- Review other state's model policies for enforcement of open records laws.
- Extending the "look back" time period for meetings held without notice beyond the current 90 days.
- Review what can be covered in executive sessions
- Create a definition of "private area" for existing body cam exemption
- Remove the exemption for legislators – communications with the public
- Add exemption for communications between legislators
- Mandated record retention schedules for political subdivisions
- Records showing contract negotiations

Stenehjem told the task force members to contact his office if there were any additional suggestions for consideration at the next meeting. He then explained that he anticipated the task force would require a maximum of three more meetings, during which the task force would work on proposed legislation to submit in the 2017 legislative session. ❖